Supreme Court, U.S.
FILED
041566 MAY 19 2005
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No. _____

In the Supreme Court of the United States

THEIS RESEARCH, INC.,
Petitioner,

v.

BROWN & BAIN
and such present and former Brown & Bain partners, associates, and other personnel responsible for the management and trial of all litigation involving Peter F. Theis and Theis Research, Inc.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent law firm previously represented petitioner in patent litigation that went awry. To comply with an arbitration clause in respondent's legal services agreement, petitioner arbitrated its malpractice claims. The award gave nothing to either side. Petitioner thereafter discovered that respondent had violated state conflict-of-interest law because it had simultaneously represented the integrated subsidiary of an adverse party in the patent litigation.

Petitioner filed this diversity action, seeking to vacate the arbitration award. Petitioner relied on state law holding unlawful contracts void *ab initio* and nullifying embedded arbitration clauses and resulting awards. Petitioner cited additional conflicts disclosed in discovery. The district court nevertheless confirmed the arbitration award and held that petitioner's conflict of interest claims were barred by claim preclusion doctrine. The court of appeals affirmed.

The following questions are presented:

1. Whether courts—as opposed to arbitrators—shall decide challenges to an underlying agreement with an arbitration clause on the ground that the agreement was void and never existed at the outset, in contrast to agreements that are merely voidable.

2. Whether, in a diversity case, state law can render an unlawful underlying agreement, including an arbitration clause and a resulting arbitration award, null and void *ab initio*.

3. Whether, for diversity jurisdiction to review an arbitration award, the amount in controversy is determined by the amount of the award or the amount in issue in the underlying dispute.

PARTIES TO THE PROCEEDING

Rule 14.1(b) Statement: The following lists all parties to the proceeding in the court whose judgment is sought to be reviewed:

Plaintiff-Appellant: Theis Research, Inc., an Illinois corporation

Defendant-Appellee: Brown & Bain, a California and Arizona law firm, and such present and former Brown & Bain partners, associates, and other personnel responsible for the management and trial of all litigation involving Peter F. Theis and Theis Research, Inc.

According to a press release dated June 23, 2004, Perkins Coie LLP and Brown & Bain, P.A., announced that effective July 1, 2004, the two firms would "combine." On July 2, 2004, Brown & Bain served a statement that: "On July 1, 2004, Brown & Bain, P.A., changed its name to Perkins Coie Brown & Bain P.A."

Rule 29.6 Statement: There is no parent or publicly held company owning 10% or more of the stock of petitioner Theis Research, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Theis Research, Inc. (Theis—pronounced "Tice") respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit as to its judgment filed and entered October 20, 2004, and amended February 18, 2005.

OPINIONS BELOW

The order amending opinion and denying rehearing petition and petition for rehearing en banc and amended opinion of the United States Court of Appeals for the Ninth Circuit is published at 400 F.3d 659 (9th Cir. 2005). *See* Appendix (App.) at 1a-15a, *infra*. The unamended opinion of the Ninth Circuit (App. at 16a-28a) is published at 386 F.3d 1180 (9th Cir. 2004). The judgment entered August 19, 2002, by the United States District Court for the Northern District of California (App. at 29a) is unpublished, as are the district court's orders of August 6, 2002 (App. at 30a-31a) and August 28, 2001 (App. at 32a-47a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 20, 2004, and amended February 18, 2005. *See* App. at 1a, 16a. A petition for rehearing was timely filed and was denied on February 18, 2005. *See* App. at 1a, 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 2 [Federal Arbitration Act]. *Validity, irrevocability, and enforcement of agreements to arbitrate*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 10 [Federal Arbitration Act]. *Same; vacation; grounds; rehearing*

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

* * *

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

28 U.S.C. § 1332 [Diversity Jurisdiction]. *Diversity of citizenship; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * *

STATEMENT OF THE CASE

There are few examples of corruption more destructive of the justice system than when, as in this case, a law firm that has failed to defend its client's rights in a case is discovered to have been working simultaneously on the payroll of parties on the other side.

A law firm's honest and diligent compliance with the ethical rules—rigorously enforced by the courts—is the public's only systematic protection against conflicts of interest. Where (as here) the client discovers the law firm's conflicts after the fact, it is all the more urgent that courts hold the firm to answer for its ethical violations.

When presented with such a case, the Ninth Circuit has instead set a precedent for overlooking and silently condoning such conduct, corrupting the judicial process.

The Ninth Circuit has decided that even for admittedly meritorious claims of unlawful conflicts of interest, private arbitrators should have the final say in deciding the legality of underlying agreements, even when they undermine the judicial process.[1] Under the Ninth Circuit's opinion, if the private arbitrator does not object, the courts are powerless to do anything about it. *See* App. at 13a.

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[1] Respondent's admissions of conflicts are referenced below. Though not focused on the unlawfulness of the conflicts, the author of the Ninth Circuit's opinion even admitted during Theis' oral argument that "you made it a fairly persuasive, a persuasive argument, a very good argument, about look, here is this basic misrepresentation in the representation agreement. That renders the agreement void. Therefore, the provision in the agreement calling for arbitration is void."

This abdicates the responsibility of courts to assure the integrity of the judicial process. Worse, it invites law firms to simultaneously represent clients with conflicting interests while concealing such conduct from the client whose representation is compromised by the conflict.

Even though this case was filed as a diversity action in California, the Ninth Circuit refused to follow California Supreme Court precedent holding that courts decide unlawfulness, including any challenge to an arbitration award (as in this case) based on illegality pertaining to the entirety of the underlying agreement. The Ninth Circuit's judgment conflicts with recognized principles of federalism intertwined in the Federal Arbitration Act, 9 U.S.C. § 2.

As discussed in the reasons for granting the petition, the courts of appeals are in conflict over whether courts—as opposed to arbitrators—shall decide whether an underlying agreement (with an arbitration clause) existed in the first place.

Decisions of the Second and Third Circuits and the California Supreme Court (interpreting the Federal Arbitration Act), and a prior Ninth Circuit decision, have distinguished between void (non-existent) underlying agreements and those that are merely voidable. They hold that courts, rather than arbitrators, shall determine whether an underlying agreement is void and thus non-existent. The Eight, Tenth, and Federal Circuits have also determined that it is the role of courts to decide whether an underlying agreement (with an arbitration clause) exists.

In conflict are the Ninth Circuit in this case and other circuits that have rejected the distinction between void and voidable contracts. Decisions of the Fifth, Sixth, and Eleventh Circuits have held that arbitrators should decide whether an underlying agreement is void.

Under decisions by the high courts of at least four states—Alabama, California (applicable here), Florida, and South Dakota—courts shall hold unlawful underlying contracts to be null and void.[2] Arbitration clauses embedded in unlawful agreements do not confer any power on an arbitrator.

In conflict with these state high court decisions are the Ninth Circuit's opinion in this case and opinions of the Fifth, Sixth, and Eleventh Circuits that arbitrators rather than courts should determine whether illegality renders an underlying agreement void *ab initio*.

A question of subject matter jurisdiction is also presented by this case: Whether a proceeding to review a zero-dollar arbitration award complies with the amount-in-controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332. The Ninth Circuit's decision in this case, where Theis did not request remand for further arbitration proceedings, conflicts with positions taken in decisions of the Sixth and Eleventh Circuits that the amount of the award must satisfy the amount-in-controversy requirement.

Factual and Procedural Background: Respondent Brown & Bain (B&B) is a law firm that represented Theis' patent rights in several matters, including unsuccessful patent litigation in the United States District Court for the Northern District of California against major telephone companies and manufacturers.[3] To comply with an

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[2] Decisions of the high courts of Iowa and Minnesota similarly recognize the role of courts to make such determinations.

[3] *See* ER 41 at 4-10, 44-55; ER 42 at 1-3; FER 96 at 32-36. Record citations are to excerpts of record (ER), including

arbitration clause in B&B's legal services agreement, Theis brought malpractice claims against B&B in an arbitration proceeding, which resulted in an award that gave nothing to Theis.[4]

The Ninth Circuit noted the arbitrator's comment that:

> Viewed as a whole, the litigation that is the subject of this arbitration was an almost unmitigated disaster both for [Theis] and for B&B.

App. at 5a. The arbitrator acknowledged that "B&B did make mistakes," but he repeatedly concluded that B&B's conduct of the patent litigation fell within the scope of professional discretion and "judgment" calls.[5]

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supplemental (SER) and further (FER) excerpts, filed in the Ninth Circuit.

Adverse parties included Pacific Telesis Group (now part of SBC) and PacTel Cellular (known later as AirTouch Cellular and subsequently part of the Verizon Wireless joint venture). *See* ER 42 at 6-8; ER 41 at 4-10, 17-22, 44-55.

The litigation concerned inventions of Peter F. Theis, the inventor or co-inventor with respect to 22 U.S. patents in telecommunications and voice processing technologies that underlie widely used applications such as interactive voice response, voicemail, automated operators, automated directory assistance, speech recognition, and automated area code detection and dialing. *See* ER 40 at 6; *see also* U.S. Patent Nos. 4,439,635 and 6,870,927 (issued March 22, 2005).

[4] ER 7 at 17-26; ER 13 at 7, 25; ER 41 at 52-53.

[5] ER 13 at 12-25.

In the months following the arbitration, Theis discovered—among roughly 100,000 documents that had been produced by B&B during the arbitration proceeding—an internal B&B memorandum that, for the first time, revealed to Theis that B&B simultaneously (and knowingly) represented a telephone company adverse to Theis in the patent litigation—before and during B&B's purported representation of Theis.[6]

In the arbitration, Theis had raised an issue about a B&B conflicting *indirect relationship*—which paled in comparison to the later discovered B&B conflicting *direct representations*. The issue concerned the handling of any potential future claims against Pacific Telesis Group (an adverse party in the patent litigation) involving use of equipment manufactured by Unisys (a B&B client that was *not* a party to the litigation).[7]

During the arbitration, Theis discovered among B&B's documents that B&B represented PacTel Cellular Inc. of Arizona.[8] Its parent corporation, PacTel Cellular, was an adverse party in the patent litigation. Under California law, however, simultaneous representation of a corporate subsidiary does not constitute a conflict of interest as to an adverse parent—unless a single identity for conflicts

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[6] ER 19 at 2-4; ER 41 at 21-22, 37 (456:21-23); ER 42 at 1-2 (¶ 2), 5-8, 23-24, 27, 29, 34-35, 49; SER 92 at 23.

[7] ER 12 at 19-21.

[8] ER 42 at 18-19. PacTel Cellular was aware of B&B's simultaneous representation of Theis and PacTel Cellular Inc. of Arizona. During the patent litigation, in-house counsel for PacTel Cellular counter-signed a letter from B&B discussing the simultaneous representation. *Id.* B&B made no such disclosure to Theis. ER 42 at 2.

purposes is established by factors such as integrated management or operations. *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal. App. 4th 223, 250-252 (1999).

During arbitration depositions, two senior B&B partners (the managing partner and the first of the name partners) gave false and misleading testimony, indicating that PacTel Cellular Inc. of Arizona did not have joint management or other ties to PacTel Cellular sufficient to permit treatment as a single entity for conflict purposes. Neither mentioned the B&B internal memorandum, even though both were named recipients.[9]

Unaware of B&B's internal memorandum, Theis did not—and could not—assert a conflicting representation in violation of California law. It could only mention, when briefing the Unisys issue, that B&B had represented an entity related to an adverse party.[10]

Subsequent to the arbitration, Theis discovered the PacTel Cellular conflict when it found B&B's internal memorandum, disclosing that B&B knew that PacTel Cellular Inc. of Arizona had a single identity with PacTel Cellular for conflict purposes.[11] To quote B&B:

> Moreover, the companies, as set forth above, appear as a practical matter to be effectively functionally integrated on the business side —PTCAZ [PacTel Cellular Inc. of Arizona] does nothing operationally and is merely an

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[9] ER 41 at 27-29, 32-34; 42 at 18-19, 23; SER 91 at 14.

[10] ER 12 at 21.

[11] ER 42 at 24, 29, 34-35.

> investment vehicle, while PacTel Cellular is an umbrella for all Pacific Telesis cellular operations. Even though disqualification for concurrent representation of a corporate parent and its wholly-owned subsidiary is based in California on a detailed factual inquiry and balancing, and not, as elsewhere, on a rigid "bright-line" rule, it appears Brown & Bain would have difficulty making the factual showing needed to avoid disqualification.[12]

Later, in its principal briefing to the Ninth Circuit, B&B acknowledged that it had indeed represented PacTel Cellular, the parent corporation.[13] B&B also admitted for the first time that it had represented Pacific Telesis, the first-tier parent corporation, which was also a named adverse party in the patent litigation.[14]

Within two weeks of discovering B&B's internal memorandum, Theis filed this diversity action in the district court,[15] charging B&B with this conflict of interest as well as the previously asserted malpractice claims, and seeking to vacate the arbitration award.[16]

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[12] ER 42 at 34-35.

[13] Appellee's brief at 9.

[14] *Id.* at 19-24, 42, 54, & 24, n.5.

[15] Theis is an Illinois corporation. When the action was filed, B&B was a California and Arizona law firm.

[16] ER 1 at 1-7. Theis later moved—as a matter of law—for reimbursement, including $1,641,427.27 that it had paid directly to B&B for fees and costs. ER 40 at 5-6; ER 42 at 3, 74-131.

Subsequently, during litigation in the district court, B&B served interrogatory answers that disclosed a total of *five* different entities—*all simultaneously represented by B&B*—whose interests were known to be adverse to Theis' rights represented by B&B in the patent litigation.[17] These included AirTouch Communications (formerly known as PacTel Corp.). In its briefing to the Ninth Circuit, B&B ultimately conceded this was a single entity for conflict purposes with its parent corporation, Pacific Telesis, an adverse party in the patent litigation.[18] Having restricted it previously, the district court stopped further discovery.[19]

The legal services agreement expressly provided that it was governed by the laws of the State of California.[20]

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[17] ER 96 at 8; ER 42 at 2, 6-8; ER 95 at 2, 10-21; ER 97 at 2; ER 109 at 1-3; *see* appellant's brief at 29-32.

[18] B&B's appellee's brief at 24, n.5. B&B not only misled Theis during the arbitration. Prior to its discovery responses, in its *prior* briefing to the Ninth Circuit during review of a venue determination, B&B made misleading statements concealing the extent of its representation of Pacific Telesis-related entities. In its *subsequent* appellee's brief, B&B referred to its "representation of Pacific Telesis" some 13 times. *Id.* at 19-24, 42, 54. But, in briefing the *prior* appeal to the Ninth Circuit, B&B stated that "Brown & Bain *never* represented Pacific Telesis, ..." 06/29/2000 appellee's brief at 17, n.2 (9th Cir. No. 00-15219)(excerpt at FER 130)(emphasis added); *see also* FER 44 at 12 (B&B's assertion that "Brown & Bain never represented Pacific Telesis Group or PacTel Cellular Corporation, ... *only* PacTel Cellular of Arizona")(emphasis added). B&B apparently had not expected that it would subsequently be compelled to reveal its representation of AirTouch Communications (formerly known as PacTel Corp.).

[19] ER 60 at 4; 69 at 4-6; 79; 87 at 2; 102 at 21; 103; 127 at 32.

[20] ER 41 at 53.

Under California law, however, B&B could not lawfully represent Theis. B&B's PacTel Cellular conflict (and other conflicts) violated California law, including the Rules of Professional Conduct, Rule 3-310(C)(3),[21] and California common law mandating a law firm's duty of loyalty.[22]

In both the district court and the Ninth Circuit, Theis primarily and repeatedly challenged the arbitration award based on B&B's conflicts of interest in violation of California law.[23] Under established California law, unlawful contracts are null and void. Where illegality affects the whole of an underlying transaction or agreement

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[21] In violation of Rule 3-310(C), B&B never obtained Theis' informed written consent for any of these conflicts. In *Chambers v. Kay*, 29 Cal. 4th 142 (2002), the California Supreme Court held that where (as here) informed written consent is required by the rules, the client cannot give consent by anything less. *Id.* at 146, 155-156. *See also* U.S. District Court, N.D. Cal., Civil Local Rule 11-4 (incorporating California Rules of Professional Conduct).

[22] *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998); *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems*, 20 Cal. 4th 1135, 1146-1147 (1999); *Anderson v. Eaton*, 211 Cal. 113, 116 (1930). *Accord Santa Clara County Counsel Attorneys Association v. Woodside*, 7 Cal. 4th 525, 548 (1994).

[23] *See, e.g.*, ER 40 at 1-2, 5-6; ER 47 at 1-4; ER 96 at 2-4; ER 102 at 7-9; appellant's brief at 20-47.

This accorded with the Ninth Circuit's prior direction to the district court that Theis' assertion of illegality be resolved on Theis' motion to vacate the award. *Theis Research, Inc. v. Brown & Bain*, 240 F.2d 795, 796 (9th Cir. 2001). The present Ninth Circuit opinion (App. at 14a) cannot be interpreted to suggest that this principal issue was not preserved for appeal.

containing an arbitration clause, the underlying agreement—including the arbitration clause—is void, and any resulting arbitration award is invalid.[24]

The district court (the same judge who had presided over the patent litigation) denied Theis' motions for partial summary judgment based on the conflicts.[25] During the arbitration proceeding, with reference to the Unisys matter, Theis had identified Unisys and Pacific Telesis Group in two interrogatory responses as "adverse interests" with which B&B had "direct *or indirect* client relationships."[26] Theis did not assert (or then know) that B&B had represented Pacific Telesis (or any related entity). Relying on this interrogatory reference to "Pacific Telesis Group,"[27] however, the district court concluded that Theis must have known during the arbitration proceeding of the conflict as to PacTel Cellular/PacTel Cellular Inc. of Arizona, even though there was no reference to either of these entities.[28] The district court then stated that by not presenting the

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[24] *Loving & Evans v. Blick,* 33 Cal. 2d 603, 609-612 (1949) (vacating award; unlicensed contractor); *All Points Traders, Inc. v. Barrington Associates,* 211 Cal. App. 3d 723, 738 (1989) (vacating award; unlicensed broker). *Accord Moncharsh v. Heily & Blase,* 3 Cal. 4th 1, 32 (1992)(distinguishing unlawfulness of isolated provision in otherwise valid transaction).

[25] App. at 30a-42a.

[26] FER 7 at 29-30 (emphasis added); 12 at 25 (only citing Rule 3-310(*B*)(3)(relationships), not 3-310(*C*)(3)(representations)).

[27] "Pacific Telesis Group" is not an informal reference to a collection of related companies but the corporate name of the senior parent. *See* ER 42 at 24; ER 96 at 63.

[28] App. at 39a-40a.

conflict issue to the arbitrator, Theis waived any claim that the arbitration was a nullity.[29]

Nevertheless, California law holds in general that unlawfulness cannot be waived or ratified,[30] and in particular it permits an unlawfulness challenge to be raised for the first time in judicial proceedings to review an arbitration award.[31] Instead of following state law, the district court granted B&B's motion to confirm the arbitration award and thereafter granted B&B's motion for summary judgment, determining that all of Theis' claims—including those for conflicts of interest—were precluded by the arbitration award.[32]

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[29] App. at 42a.

[30] *City Lincoln-Mercury Co. v. Lindsey*, 52 Cal. 2d 267, 274 (1959). *Accord International Assn. of Fire Fighters v. City of San Leandro*, 181 Cal. App. 3d 179, 182 (1986).

[31] *Loving & Evans v. Blick*, 33 Cal. 2d at 610-612; *Alternative Systems, Inc. v. Carey*, 67 Cal. App. 4th 1034, 1040 (1998); *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882, 892, 893, n.8 (1997); *South Bay Radiology Medical Assoc. v. W. M. Asher, Inc.*, 220 Cal. App. 3d 1074, 1080-1081 (1990). *Accord Moncharsh v. Heily & Blase*, 3 Cal. 4th at 32.

[32] App. at 31a, 38a-39a, 47a; ER 40 at 1, 5; ER 47 at 1-4; ER 94 at 1-4; ER 102 at 7-9. The district court used the federal transactional test, applied broadly to preclude claims a party "could have raised," instead of California claim preclusion doctrine. App. at 31a. Under California's incorporation of primary rights theory in preclusion doctrine—which rejects the transactional approach to claim preclusion—where (as here) a distinct, non-identical cause of action was not litigated in a prior proceeding, it is not precluded. *International Evangelical Church v. Church of the Soldiers etc.*, 54 F.3d 587, 590-591 (9th Cir. 1995).

The Ninth Circuit's opinion affirms the judgment entered by the district court. Without any support in the record, and without specifying the "conflicts" being referenced (e.g., the Unisys matter v. the simultaneous representation of PacTel Cellular/PacTel Cellular Inc. of Arizona or AirTouch Communications/Pacific Telesis), the Ninth Circuit held (App. at 13a) that:

> Theis submitted to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the Theis-B&B legal services agreement void *ab initio*. The arbitrator rendered a decision on this issue adverse to Theis. The district court thus did not err when it determined that Theis was barred from relitigating the same issue as part of its federal court malpractice claims.

While the opinion vitiates the district court's waiver theory, the ultimate problem is the same: The Ninth

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B&B's conflicts of interest resulting from its representations of PacTel Cellular/PacTel Cellular, Inc. of Arizona (discovered from the B&B internal memorandum found after the arbitration) and AirTouch Communications, GTE Mobile Communications, AT&T, and U.S. West Real Estate (disclosed in interrogatory responses while this case was pending) were distinct and separate wrongs against Theis. Therefore, under primary rights doctrine, Theis' damage claims based on each of these conflicts of interest constitutes a separate cause of action, which was not determined in the arbitration proceeding. *Branson v. Sun-Diamond Growers*, 24 Cal. App. 4th 327, 341-342 (1994).

Under California law, these conflict-of-interest claims are not precluded. The claims in arbitration did not involve federal questions, and B&B's legal services agreement (if given effect) provided that California law governs. ER 41 at 53.

Circuit's opinion cedes to arbitrators the judicial responsibility to determine whether an underlying agreement containing an arbitration clause is null and void *ab initio*.[33] It holds that arbitrators have the final say on conflicts of interest that undermine public confidence in the integrity of the judicial process, and that courts shall then do nothing to hold law firms engaging in such conduct to answer to their clients.

Yet by confirming an arbitration award rooted in an underlying agreement that was entered into unlawfully, both the Ninth Circuit and the district court have sealed the imprimatur of the federal courts on that illegality in derogation of state law.

REASONS FOR GRANTING THE PETITION

I. The Conflict among Several Circuits—over Whether Courts, as Opposed to Arbitrators, Shall Decide Challenges to an Underlying Agreement as Null and Void *ab Initio*—Concerns an Important Federal Question That Needs Resolution

Under the Federal Arbitration Act, the power of an arbitrator depends upon "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . ., or an agreement in writing to submit to arbitration an existing controversy arising out

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[33] The Ninth Circuit amended its opinion, simply deleting (a) its statement that Theis was required to submit the issue to the arbitrator and (b) its mis-citation of prior Ninth Circuit authority to the contrary. App. at 3a-4a. (The unamended version appears in bound volume 386 F.3d at 1185.) There is no substantive change, as the court still confirms the arbitrator's purported ruling without deciding the issue.

of such a contract, ..." 9 U.S.C. § 2. Such a provision or agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity* for the revocation of any contract." *Id.* (emphasis added).

Without such a contract or an agreement, there is no power to arbitrate.

In this case, B&B's legal services agreement was null and void *ab initio*. Because its PacTel Cellular conflict (and other conflicts) violated California law, including the Rules of Professional Conduct, Rule 3-310(C)(3),[34] and California common law mandating a law firm's duty of loyalty,[35] B&B could not lawfully represent Theis.

An agreement in violation of the Rules of Professional Conduct is unlawful and unenforceable. *Kallen v. Delug*, 157 Cal. App. 3d 940, 948-949, 951 (1984). "[A]n illegal contract is void . . .." *Id.* at 948, n.2. *See Chambers v. Kay*, 29 Cal. 4th at 158 (giving effect to agreement violating rules "would be untenable . . . ").

Under California law, private parties lack the capacity to enter into an unlawful contract. B&B lacked the capacity to enter into the legal services agreement. Similarly, Theis lacked any capacity to ratify the agreement.

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[34] *See also* U.S. District Court, N.D. Cal., Civil Local Rule 11-4 (incorporating California rules).

[35] *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998); *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems*, 20 Cal.4th 1135, 1146-1147 (1999); *Anderson v. Eaton*, 211 Cal. 113, 116 (1930).

> A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his right to urge that defense.

City Lincoln-Mercury Co. v. Lindsey, 52 Cal. 2d at 274. *Accord International Assn. of Fire Fighters v. City of San Leandro*, 181 Cal. App. 3d at 182.

The purported legal services agreement—including the arbitration clause—was not merely voidable. It was null and void from the outset. That issue should be determined by a court. Further, the arbitration award should be vacated under 9 U.S.C. § 10(a)(4) because the arbitrator had no authority.

Applying the Federal Arbitration Act, the California Supreme Court determined in *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal. 4th 394 (1996), that: "If the entire contract is void *ab initio* . . ., the parties have not agreed to arbitrate any controversy; . . .." *Id.* at 416.

In the case before it, the court distinguished between fraud in the execution of the underlying agreement and fraud in the inducement. Because fraud in the execution would render the contract void, it is to be determined by a court. *Id.* at 417. Fraud in the inducement, however, would not negate the existence of the contract, but would only render it voidable, permitting the defrauded party the election of rescinding or enforcing the contract. *Id.* at 415.

Accordingly, the court distinguished the rule set forth by this Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), that an arbitrator decides a defense of fraud in the inducement of a contract

unless the fraud relates specifically to the arbitration clause itself and not to the contract.[36] *Id.* at 416.

Several circuits have also held that courts—rather than arbitrators—are to decide issues as to whether an underlying contract even existed or was null and void *ab initio.*[37]

In *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136, 1140 (9th Cir. 1991), the Ninth Circuit previously held that courts, not arbitrators, decide issues that determine whether an underlying contract (with an arbitration clause) existed in the first place. *Id.* at 1140-1141. *Three Valleys* distinguished the rule in *Prima Paint*, explaining that *Prima Paint* only concerned an issue of "voidability"—not a challenge to whether a valid contract existed at the outset.

> . . . *Prima Paint* applies to "voidable" contracts—those "where one party was an infant, or where the contract was induced by

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[36] The *Prima Paint* rule is a practical necessity: Otherwise, any party claiming breach of a contract (that contains an arbitration clause) could claim fraud in the inducement and avoid arbitration by simply alleging that the breach manifests a false promise without an intent to perform.

[37] In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-945 (1995), this Court held regarding arbitrability that courts, rather than arbitrators, decide the scope of an arbitrator's authority under an arbitration clause—unless the parties have explicitly agreed to confer power on the arbitrator to decide arbitrability. Yet even the power of an arbitrator to decide the scope of a clause, when so empowered by such an explicit agreement, presupposes the existence of a valid underlying contract or agreement.

> fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract." [Citation.] . . . . But, because an "arbitrator's jurisdiction is rooted in the agreement of the parties," [citations] a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. [Footnote.] *Only a court can make that decision.*

925 F.2d at 1140-1141 (emphasis added).

Other circuits have taken the *Three Valleys* approach. In *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000), the Third Circuit held:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the existence of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or non-existent, as is contended here, and those that are merely "voidable," as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of an arbitration agreement is in dispute.

Id. at 107 (footnote omitted). Whether there is an agreement to arbitrate in turn depends on the validity of the underlying contract. *Id.* at 106.

Citing *Three Valleys* and *Sandvik*, in *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2d Cir. 2001), the Second Circuit also invoked "the distinction

between void and voidable contracts, a distinction already recognized in at least two other circuits."

> A void contract is one that produces no legal obligation. . . . [A] party alleging that a contract is void—and providing some evidence in support—is entitled to a trial on the contract's arbitrability.

Id. at 31.[38]

In *Spahr v. Secco*, 330 F.3d 1266, 1272, n.7 (10th Cir. 2003), the Tenth Circuit acknowledged that:

> It is true that many circuits have applied *Prima Paint* to voidable contracts—i.e., those where the contract was induced by fraud, mistake, or duress—but not to void contracts.

The court proceeded to distinguish *Prima Paint* even further, holding that even a question of voidability should be determined by the court—rather than the arbitrator—where the party objecting to arbitration asserted that the

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[38] Applying the Federal Arbitration Act, the Supreme Court of Minnesota cited *Sphere Drake*, *Sandvik AB*, and *Three Valleys* in making the distinction that courts hear claims that a disputed contract is *void*, while claims that a contract is *voidable* must be arbitrated. *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 353 (Minn. 2003).

> [P]arties may not be compelled to arbitrate claims if they have alleged that the contract at issue never legally existed.

Id. at 354.

underlying agreement with the arbitration clause was unenforceable based on a lack of mental capacity to enter into the agreement in the first place. *Id.* at 1272-1273.

In *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986), the Eighth Circuit stated:

> Case law supports our holding that the enforceability of an arbitration clause is a question for the court when one party denies the existence of a contract with the other.

Id. at 400 (directing district court to disregard arbitrators' validity holding).

In *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1356-1358 (Fed. Cir. 2004), the Federal Circuit determined that whether the plaintiff was a successor to a license agreement, which contained an arbitration clause, was a "gateway" issue to be determined by a court. To determine whether an arbitration agreement exists, the existence of the entire agreement was a "threshold question" for the court. *Id.* at 1358.

Still other circuits, however, have taken a contrary approach, rejecting the "void" versus "voidable" distinction. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 215, n.15 (5th Cir. 2003). *Will-Drill* held that a court must determine whether a contract contained sufficient signatures to be valid and therefore binding on even admitted signatories. The court attempted to distinguish Fifth Circuit precedent that an arbitrator determines whether illegality renders a contract void *ab initio*.

> We are forced here to an admittedly fine distinction. And we do not doubt that this distinction will occasionally be elusive.

Id. at 219.

In *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), the Sixth Circuit reversed and remanded a district court decision that relied on *Three Valleys* in holding that the court must determine whether illegality rendered an underlying agreement void *ab initio*.

Citing *Burden*, the Eleventh Circuit in *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002), held that an arbitrator should determine whether illegality rendered the substance of the underlying agreement void.

Burden was recently criticized in its circuit in a concurring opinion in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 518-521 (6th Cir. 2004)(Cleland, D.J., sitting by designation, concurring.)

> Void and void *ab initio* agreements, as opposed to voidable agreements, are agreements that never existed. Confining void (or void *ab initio*) contracts to a narrow set of circumstances, as the court did in *Burden*, abrogates long-standing principles defining void contracts and holds as of no effect any legislature's decision to deem certain agreements void when they fail to comply with statutory requirements, ...
>
> The Federal Arbitration Act's policy favoring arbitration cannot compel an agreement to arbitrate where no contract

> exists. *A void contract is simply nonexistent and a provision of a contract that does not exist should not be separately enforceable.* This includes an arbitration clause.

Id. at 520-521 (emphasis added).

This important and recurring issue should be resolved.

II. The Conflict—over Whether, in a Diversity Case, State Law Can Render an Unlawful Underlying Agreement Void *ab Initio*, Nullifying the Arbitration Clause and Resulting Award—Concerns an Important Federal Question That Needs Resolution

Even though this case was brought as a diversity action, the Ninth Circuit refused to apply state law holding that unlawfulness pertaining to the whole of the underlying agreement renders the agreement—including the arbitration clause and the resulting arbitration award—null and void *ab inito*.

State-law contract rules govern the validity of arbitration agreements.

> When deciding whether the parties agreed to arbitrate a certain matter . . ., courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. at 944.

In *Prima Paint*, this Court noted that when enacting the Federal Arbitration Act, Congress intended "to make arbitration agreements as enforceable as other contracts, but not more so." 388 U.S. at 404, n.12.

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995). *Accord Doctor's Associates v. Casarotto*, 517 U.S. 681, 686-687 (1996).

California law meets the neutrality test because it holds generally that unlawful contracts are null and void. *See City Lincoln-Mercury Co. v. Lindsey*, 52 Cal. 2d at 274; *International Assn. of Fire Fighters v. City of San Leandro*, 181 Cal. App. 3d at 182; *Kallen v. Delug*, 157 Cal. App. 3d at 948, n.2. *See also Chambers v. Kay*, 29 Cal. 4th at 158 (giving effect to agreement violating the Rules of Professional Conduct "would be untenable . . . ").

In accordance with the general principle that unlawful contracts are void, California law holds that an arbitration award arising from an unlawful contract will not be enforced. *Loving & Evans v. Blick*, 33 Cal. 2d at 609-612 (vacating award; unlicensed contractor); *All Points Traders, Inc. v. Barrington Associates*, 211 Cal. App. 3d at 738 (vacating award; unlicensed broker).

In addition to the California Supreme Court, the high courts of at least three other states have determined that an arbitration clause is void and without effect when it is embedded in an illegal contract:

- Alabama: *Alabama Catalog Sales v. Gloria Harris M.Q., Inc.*, 794 So. 2d 312 (Ala. 2000)

- Florida: *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005)

- South Dakota: *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, 648 N.W.2d 804 (S.D. 2001).[39]

Accord Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe, 656 N.W.2d 167 (Iowa 2003). In *Iowa Mgmt. & Consultants*, the Iowa Supreme Court held that the lower court was to decide a challenge to the validity of the underlying agreement as invalid under federal tribal gaming law. *Id.* at 171-172. "[I]f the entire agreement is invalid under federal law, this would also invalidate the provision in the agreement for arbitration of disputes." *Id.*

Although the California Supreme Court did not decide *Loving & Evan v. Blick* under the Federal Arbitration Act, it relied on a state statute (Cal. Code Civ. Proc. § 1288(d)) that tracks the language of 9 U.S.C. § 10(a)(4):

> [T]he award must be vacated "where the arbitrators exceeded their powers, . . ." It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise.

33 Cal.2d at 609-610.

The applicability of such state law is an important and recurring question under the Federal Arbitration Act. This

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[39] *See also Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d at 354 (Minnesota Supreme Court), discussed *supra*, 20, n.38.

Court has determined that the Act applies to state court proceedings (*Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)), and that "the statute provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' . . . " (*Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)). According, the issue needs resolution by this Court as a question of federal law.

Contrary to the above-cited state high court decisions, the Fifth, Sixth, and Eleventh Circuits have given effect to arbitration clauses contained in underlying agreements challenged as unlawful, holding that that an arbitrator determines whether illegality renders a contract void *ab initio*. *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1160-1162 (5th Cir. 1987); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 515-518 (6th Cir. 2004); *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002).

Under California law, courts must decide if the underlying agreement was entered into unlawfully. The issue is not left to arbitrators.[40] Where, as in this case, the unlawfulness of the agreement as a whole is in issue, California authorities hold uniformly that unlawfulness may be raised at any time, including raising unlawfulness for the first time on a motion to vacate, or in opposition to a motion to confirm, the arbitration award. *Loving & Evans v. Blick*, 33 Cal. 2d at 610-612[41]; *Alternative Systems, Inc.*

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[40] As applied to the particular facts of this case, a law firm's violation of conflict-of-interest rules should be public knowledge and should be adjudicated in a public forum. It should not be buried in a private arbitration.

[41] The Ninth Circuit's judgment conflicts directly with the California Supreme Court's holding that:

v. Carey, 67 Cal. App. 4th 1034, 1040 (1998); *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882, 892, 893, n.8 (1997); *South Bay Radiology Medical Assoc. v. W. M. Asher, Inc.*, 220 Cal. App. 3d 1074, 1080-1081 (1990). *Accord Moncharsh v. Heily & Blase*, 3 Cal. 4th at 32.

Whether such state law is to be given effect raises an important and recurring question under the Federal Arbitration Act that should be settled by this Court.

> [T]he rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court.

Id. at 609. The Ninth Circuit cited *Ficek v. Southern Pacific*, 338 F.2d 655 (9th Cir. 1964) for the proposition that a party may not submit an issue to arbitration and then challenge the arbitrator's authority. However, as one of the judges acknowledged at oral argument, *Ficek* involved a valid arbitration agreement, the only issue being whether the claim in question was within the scope of the original agreement (the *Ficek* court found it was).

Moreover, conduct cannot furnish by implication a substitute agreement to arbitrate. 9 U.S.C. § 2 (arbitration agreement must be "in writing"); Cal. Code Civ. Proc. § 1281 (same). Also, *Ficek* does not answer whether state law applies.

III. Conflict Concerning the Applicable Amount in Controversy for Diversity Jurisdiction to Review an Arbitration Award—Whether the Amount of the Award or the Amount in Issue in the Underlying Dispute—Should Be Resolved

This case involves review of a zero-dollar arbitration award. In the arbitration proceeding, Theis sought damages for malpractice far in excess of the $75,000 threshold for jurisdiction under 28 U.S.C. § 1332. Theis' complaint sought to have the zero-dollar award vacated, reasserted its malpractice claims, and asserted the newly discovered violation of California conflict-of-interest law.

The Ninth Circuit's opinion holds that the amount in controversy to review an arbitration award under 28 U.S.C. § 1332 is determined by the amount of the underlying dispute rather than the amount of the award. App. at 5a. This holding conflicts with opinions in two other circuits.

The Sixth Circuit in *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255 (6th Cir. 1994), determined that the district court did not have diversity jurisdiction over a complaint to vacate an arbitration award against the plaintiff because the award was less that the § 1332 threshold, even though the plaintiff himself had claimed more in the underlying arbitration. *Id.* at 260. The court noted that the plaintiff did not ask the district court to order the arbitrators to re-open his claim against the defendant. *Id.*

In this case, neither Theis by its action nor B&B by its petition asked for a remand to the arbitrator.[42]

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[42] In *Sirotzsky v. New York Stock Exchange*, 347 F.3d 985 (7th Cir. 2003), the Seventh Circuit stated that the amount sought in arbitration can be included in the amount in controversy

The Eleventh Circuit in *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), determined that the district court did not have diversity jurisdiction to review an arbitration award because the award was less than the § 1332 threshold, even though the defendant had sought damages exceeding the § 1332 threshold in the underlying arbitration. *Id.* at 1468, 1472.

Unlike a case initiated by only a complaint for damages filed in a district court, where an arbitrator has issued an award and the case first comes to court for review, the award provides a new point of reference for determining the amount in controversy for purposes of § 1332.

The issue is whether § 1332 entitles every diverse plaintiff, who seeks to vacate a zero-dollar or minimal arbitration award, to have the award reviewed by a federal district court, followed by de novo review by a federal court of appeals.[43]

"*provided* the plaintiff is seeking to reopen the arbitration." *Id.* at 989 (emphasis added).

In *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321 (1st Cir. 2000), the First Circuit found there was jurisdiction to review a partial arbitration award, rendered in the first phase of a bifurcated arbitration proceeding, that was less than the $75,000 threshold. However, the amount remaining in controversy on the second phase exceeded $75,000, and the basis for challenging the first phase award would have effectively barred recovery in the second phase as well. The requested remand as to the first phase could have resulted in an award in excess of $75,000 for that first phase alone. *Id.* at 329.

[43] If the amount in controversy is, indeed, determined by the amount of the award, subject matter jurisdiction cannot be predicated simply on a party's reasserting in a complaint the very

Given the conflict created by the Ninth Circuit's opinion and the recurring nature of this issue, the question—whether the jurisdictional amount is determined by the arbitration award or the amount of the underlying dispute—should be resolved by this Court.

CONCLUSION

Based on the foregoing, Theis respectfully requests that the Court grant this petition.

Respectfully submitted,

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May 2005

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same claims made in the arbitration. To predicate supplemental jurisdiction on a related claim, the anchor claim, in its own right, "must have substance sufficient to confer subject matter jurisdiction on the court." *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)(federal question anchor).

As Theis briefed the Ninth Circuit, recognizing Theis' conflict-of-interest claims arising from B&B's simultaneous conflicting representations as new, independent claims that were not subsumed in the arbitration would be an independent basis for subject matter jurisdiction, but this would also compel a determination that Theis' conflict-of-interest claims are not barred by claim preclusion doctrine, requiring a reversal of the judgment of the district court.

APPENDIX

FOR PUBLICATION

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEIS RESEARCH, INC., an Illinois corporation, *Plaintiff-Appellant*, v. BROWN & BAIN, a California and Arizona law firm, and such present and former Brown & Bain partners, associates, and other personnel responsible for the management and trial of all litigation involving Peter F. Theis and Theis Research, Inc., *Defendant-Appellee.*	No. 02-16839 D.C. No. CV-99-20645-RMW ORDER AMENDING OPINION AND DENYING REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED ORDER

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
November 5, 2003—San Francisco, California

Filed October 20, 2004
Amended February 18, 2005

Before: David R. Thompson and Stephen S. Trott,

Circuit Judges, and Charles R. Weiner,*
Senior District Judge.

Opinion by Judge Thompson

COUNSEL

Paul R. Johnson, Oakland, California, for the plaintiff-appellant.

Paul Renne, San Francisco, California, for the defendant-appellee.

ORDER

The opinion in *Theis Research, Inc. v. Brown & Bain*, published at 386 F.3d 1180 (9th Cir. 2004), is amended as follows:

1. At page 1184, the first sentence of the last beginning paragraph on that page is deleted. The deleted sentence reads:

> Our conclusion that we measure the amount in controversy by the amount at stake in the underlying litigation is consistent not only with *American Guaranty* from this circuit, but with decisions from other circuits as well.

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* Hon. Charles R. Weiner, Senior District Judge for Eastern Pennsylvania, sitting by designation.

The deleted sentence is replaced by the following sentence:

> Our decision to measure the amount in controversy in this case by the amount at stake in the underlying litigation is consistent not only with *American Guaranty* from this circuit, but with decisions from other circuits as well.

2. At page 1185, the first two sentences of the second paragraph under III MERITS are deleted. The deleted sentences read as follows:

> Theis was required to submit to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the Theis - B&B legal services agreement void *ab initio*. *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136, 1140 (9th Cir. 1991) (federal court may consider a defense of fraud in the inducement of a contract only if the fraud relates specifically to the arbitration clause itself and not to the contract generally). The issue was actually submitted to the arbitrator, who rendered a decision adverse to Theis.

The two deleted sentences are replaced by the following two sentences:

> Theis submitted to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the Theis-B&B legal services agreement void *ab initio*. The arbitrator rendered a decision on this issue adverse to Theis.

With the foregoing amendments, the panel has voted unanimously to deny the petition for rehearing. Judge Trott has also voted to deny the petition for rehearing en banc, and Judges Thompson and Weiner recommend denial of that petition.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on the petition for en banc rehearing. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained.

OPINION

THOMPSON, Senior Circuit Judge:

This appeal presents the primary question whether, in a case in which a party seeks to vacate an arbitration award, the amount in controversy for diversity jurisdiction under 28 U.S.C. § 1332(a) is measured by the amount of the award or by the amount in dispute in the underlying litigation between the parties. The arbitration award which Theis Research, Inc. ("Theis") moved to vacate was for zero dollars. Contemporaneously with that motion, Theis filed a complaint that sought damages from Brown & Bain ("B&B") in excess of $200 mil-lion. The claims Theis alleged in this complaint substantially mirrored the claims it had asserted in the arbitration proceeding, which claims the arbitrator had rejected.

If we measure the amount in controversy for purposes of 28 U.S.C. § 1332(a) by the amount of the arbitration award, the district court lacked subject matter jurisdiction.

If we measure the amount in controversy by the amount in dispute in the underlying litigation, the district court had subject matter jurisdiction.

We conclude that the amount at stake in the underlying litigation, not the amount of the arbitration award, is the amount in controversy for purposes of diversity jurisdiction, and thus the district court had jurisdiction under 28 U.S.C. § 1332. The court denied Theis's motion to vacate the zero dollar arbitration award, granted B&B's motion to confirm the award, and granted summary judgment in favor of B&B and against Theis on the claims Theis asserted in its complaint. Theis appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

FACTS AND PROCEEDINGS

B&B was Theis's attorney in patent litigation that turned out badly. Theis demanded arbitration of claims against B&B for legal malpractice, breach of fiduciary duty, fraud and breach of contract. The ensuing arbitration resulted in a zero dollar award to each party. In commenting on the litigation that spawned the arbitration, the arbitrator stated:

> Viewed as a whole, the litigation that is the subject of this arbitration was an almost unmitigated disaster both for [Theis] and for B&B. The hopes of [Theis] and its investors were dashed; years of work by Mr. Theis and others went unrequited; B&B got no return on millions of dollars of invested time, and had to chalk up a major loss on its results chart.

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After court proceedings which are not relevant to the issues before us, B&B filed a motion to confirm the arbitrator's award. Theis responded with a renewed motion to vacate the award and a motion for partial summary judgment. The district court denied Theis's motion to vacate and its motion for partial summary judgment. The court granted B&B's motion to confirm the award. Thereafter, the district court granted summary judgment in favor of B&B, which judgment rejected all of the claims Theis asserted in its complaint. This appeal followed.

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The question of subject matter jurisdiction was called to our attention by *Luong v. Circuit City Stores, Inc.*, 256 F.3d 1188 (9th Cir. 2004) (*Luong I*), an opinion now withdrawn, which was filed after we had filed our memorandum disposition. In the *Luong I* opinion, a panel of this court,

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Theis argues, however, that we should ignore the claims it asserted in its district court complaint because those claims were "non-substantial" as evidenced by the district court's eventual dismissal of them as barred by *res judicata*. We reject this argument. To treat Theis's claims as non-substantial simply because they were eventually dismissed as being barred by *res judicata* would retroactively preclude jurisdiction in any action in which the affirmative defense of *res judicata* was asserted and successfully maintained. The question is not whether B&B was successful in its *res judicata* defense. The question is whether the amount of damages Theis claimed in its complaint was asserted in good faith; if so, that amount controls for purposes of diversity jurisdiction. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938).

There is nothing on the face of Theis's complaint, nor in the record before us, to suggest that the claims Theis asserted in the district court were not asserted in a good faith belief in the validity of those claims, notwithstanding that it turned out Theis's good faith belief was misplaced. *See id.*; *see also Budget Rent-a-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997) (dismissal for lack of jurisdiction not proper if claim exceeding jurisdictional amount is made in the com-plaint in good faith, even when later events reduce the amount recoverable).

[1] The question presented to us thus boils down to whether the $200 million Theis sought to recover by its complaint is the amount in controversy under 28 U.S.C. § 1332(a), or whether the amount in controversy must be measured by the zero dollar arbitration award Theis sought to vacate. We are satisfied that the amount in controversy is the amount Theis sought to recover by its complaint.

Decisions from other circuits support this conclusion, although the cases have turned upon whether the party seeking to vacate an arbitration award also sought to reopen the arbitration. *See Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 989 (7th Cir. 2003) ("[T]he amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration."); *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1472 n.16 (11th Cir. 1997) ("[T]he [plaintiffs] did not request an award modification that would provide [them] with money. Instead, [they] sought merely to reduce or eliminate the arbitration award against them."); *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 260 (6th Cir. 1994) ("In the arbitration proceedings [the plaintiff] claimed more than $50,000 against Hamilton Investments, but he never asked the district court to order that the arbitrators reopen his claim . . ."); *but see American Guaranty,* 72 F.2d at 211 (concluding that the amount in controversy in the arbitration itself determines jurisdiction; no apparent request for remand to arbitration); *Bull HN Info. Sys., Inc. v. Huston*, 229 F.3d 321, 329 (1st Cir. 2000) (reversing district court decision dismissing petition to vacate arbitration award based on fact that plaintiff did not seek remand to arbitration; instead, measuring "the amount in controversy by the amount at stake in the entire arbitration").

Although neither Theis nor B&B asked that the arbitration proceedings be reopened, Theis sought to obtain by its district court complaint substantially what it had sought to obtain in the arbitration. Theis simply chose to "reopen" its claims in the district court rather than in arbitration. The amount in controversy requirement of 28 U.S.C. § 1332(a) was satisfied.

[2] Our decision to measure the amount in controversy in this case by the amount at stake in the underlying litigation is consistent not only with *American Guaranty* from this circuit, but with decisions from other circuits as well. In the Eleventh Circuit's decision in *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), the Baltins sought to undo an arbitration award under which they were required to pay Alaron Trading $36,284.69. *Id.* The court held that the then jurisdictional minimum of $50,000 was not met because "[t]he maxi-mum remedy sought by the Baltins was the vacatur of the arbitration award of $36,284.69." *Id.* Because neither the Baltins nor Alaron Trading sought additional damages, the amount in controversy was limited to the amount of the arbitration award. *See id.* & n.16.

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amount by almost $20,000.

Id. (emphasis added).

[3] We conclude that in the present case the monetary threshold of $75,000 for diversity jurisdiction under 28 U.S.C. § 1332(a) has been met. There is no dispute as to diversity of the parties. The district court, therefore, had subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

III

MERITS

Theis also appeals the district court's summary judgment in favor of B&B by which the court rejected Theis's claims for breach of professional and fiduciary duty, legal malpractice, and fraud. We affirm the district court's summary judgment.

[4] Theis submitted to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the Theis-B&B legal services agreement void *ab initio*. The arbitrator rendered a decision on this issue adverse to Theis. The district court thus did not err when it determined that Theis was barred from relitigating the same issue as part of its federal court malpractice claims. *Ficek v. S. Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964) (claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, challenge the authority of the arbitrator to act).

Having submitted the claim to the arbitrator, Theis could seek vacatur of the arbitral result only if it was a manifest disregard of the law, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)), an implausible interpretation

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[5] Nor did the district court abuse its discretion when it refused to permit additional discovery. "We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994) (emphasis in original). Theis failed to show how the additional discovery it sought would have precluded summary judgment. The district court did not err in denying further discovery.

No other issues raised in this appeal warrant further discussion.

AFFIRMED.

FOR PUBLICATION

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEIS RESEARCH, INC., an Illinois corporation, *Plaintiff-Appellant*, v. BROWN & BAIN, a California and Arizona law firm, and such present and former Brown & Bain partners, associates, and other personnel responsible for the management and trial of all litigation involving Peter F. Theis and Theis Research, Inc., *Defendant-Appellee*.	No. 02-16839 D.C. No. CV-99-20645-RMW OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
November 5, 2003—San Francisco, California

Filed October 20, 2004

Before: David R. Thompson and Stephen S. Trott,
Circuit Judges, and Charles R. Weiner,*
Senior District Judge.

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* Hon. Charles R. Weiner, Senior District Judge for Eastern Pennsylvania, sitting by designation.

COUNSEL

Paul R. Johnson, Oakland, California, for the plaintiff-appellant.

Paul Renne, San Francisco, California, for the defendant-appellee.

OPINION

THOMPSON, Senior Circuit Judge:

This appeal presents the primary question whether, in a case in which a party seeks to vacate an arbitration award, the amount in controversy for diversity jurisdiction under 28 U.S.C. § 1332(a) is measured by the amount of the award or by the amount in dispute in the underlying litigation between the parties. The arbitration award which Theis Research, Inc. ("Theis") moved to vacate was for zero dollars. Contemporaneously with that motion, Theis filed a complaint that sought damages from Brown & Bain ("B&B") in excess of $200 mil-lion. The claims Theis alleged in this complaint substantia lly mirrored the claims it had asserted in the arbitration proceeding, which claims the arbitrator had rejected.

If we measure the amount in controversy for purposes of 28 U.S.C. § 1332(a) by the amount of the arbitration award, the district court lacked subject matter jurisdiction. If we measure the amount in controversy by the amount in dispute in the underlying litigation, the district court had subject matter jurisdiction.

We conclude that the amount at stake in the underlying litigation, not the amount of the arbitration award, is the amount in controversy for purposes of diversity jurisdiction, and thus the district court had jurisdiction under 28 U.S.C. § 1332. The court denied Theis's motion to vacate the zero dollar arbitration award, granted B&B's motion to confirm the award, and granted summary judgment in favor of B&B and against Theis on the claims Theis asserted in its complaint. Theis appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

FACTS AND PROCEEDINGS

B&B was Theis's attorney in patent litigation that turned out badly. Theis demanded arbitration of claims against B&B for legal malpractice, breach of fiduciary duty, fraud and breach of contract. The ensuing arbitration resulted in a zero dollar award to each party. In commenting on the litigation that spawned the arbitration, the arbitrator stated:

> Viewed as a whole, the litigation that is the subject of this arbitration was an almost unmitigated disaster both for [Theis] and for B&B. The hopes of [Theis] and its investors were dashed; years of work by Mr. Theis and others went unrequited; B&B got no return on millions of dollars of invested time, and had to chalk up a major loss on its results chart.

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Id. (emphasis added).

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[4] Theis was required to submit to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the Theis - B&B legal services agreement void *ab initio*. *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136, 1140 (9th Cir. 1991) (federal court may consider a defense of fraud in the inducement of a contract only if the fraud relates specifically to the arbitration clause itself and not to the contract generally). The issue was actually submitted to the arbitrator, who rendered a decision adverse to Theis. The district court thus did not err when it determined that Theis was barred from relitigating the same issue as part of its federal court malpractice claims. *Ficek v. S. Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964) (claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, challenge the authority of the arbitrator to act).

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[5] Nor did the district court abuse its discretion when it refused to permit additional discovery. "We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994) (emphasis in original). Theis failed to show how the additional discovery it sought would have precluded summary judgment. The district court did not err in denying further discovery.

No other issues raised in this appeal warrant further discussion.

AFFIRMED.

FILED
AUG. 6, 2002
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEIS RESEARCH, INC.,	NO. C-99 20645 RMW
Plaintiff,	JUDGMENT
v.	
BROWN & BAIN,	
Defendant.	

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Theis Research, Inc. take nothing by way of its complaint and that judgment be entered in favor of defendant Brown & Bain, a California and Arizona law firm, and such present and former Brown & Bain partners, associates, and other personnel responsible for the management and trial of all litigation involving Peter F. Theis and Theis Research, Inc.

DATED: 8/05/02

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Entered 8/19/02

FILED
AUG. 6, 2002
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEIS RESEARCH, INC., Plaintiff, v. BROWN & BAIN, Defendant.	NO. C-99 20645 RMW ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION AND MOTION FOR PARTIAL SUMMARY JUDGMENT [Re: Docket Nos. 90 and 94]

On July 26, 2002, the court heard two motions filed by the parties: defendant's motion for summary judgment and plaintiff's motion for leave to file a motion for reconsideration and for partial summary judgment. Each party opposes the other party's motion. Having considered the papers submitted by the parties and having had the benefit of oral argument on the motions, for the reasons set forth below, the court grants defendant's motion and denies plaintiffs motion.

Plaintiff's motion for leave to file a motion for reconsideration and for partial summary judgment is denied. Plaintiff has shown no new actual conflicts of interest and has failed to demonstrate adequate grounds for the court to reconsider its prior order.

Defendant's motion for summary judgment is granted. Res judicata applies to preclude plaintiff from litigating the claims it seeks to litigate in this action. Int'l Assoc. of Machinists & Aerospace Workers v. Aeroiet-General Corp.. 263 F. Supp. 343, 346 (CD. Cat 1966). TRI is barred from relitigating any claim that it raised, or could have raised, in the arbitration. Clark v. Bear Stearns & Co.. Inc.. 966 F.2d 1318,1320 (9th Cir. 1992); Sutphin v. Speik. 15 Cal.2d 195, 202 (1940). Moreover, plaintiff raised the issue of Brown & Bain's alleged disabling and undisclosed conflict of interest in the arbitration proceedings, plaintiff had the opportunity to conduct discovery into the conflicts of interest and availed itself of that opportunity. Plaintiff had the opportunity to litigate the issue in arbitration and is now barred from litigating it in this action. Each of TRI's present claims falls within the scope of claims that were, or could have been, raised by TRI in the arbitration. Therefore, TRI is barred from asserting those claims in litigation and defendant is entitled to summary judgment.

ORDER

For the foregoing reasons, defendant Brown & Bain's motion for summary judgment is GRANTED and plaintiff Theis Research, Inc.'s motion for leave to file a motion for reconsideration and for partial summary judgment is DENIED.

DATED: 8/5/02

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

ORIGINAL
FILED
AUG. 28, 2001
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEIS RESEARCH, INC., Plaintiff, v. BROWN & BAIN, Defendant.	NO. C-99 20645 RMW ORDER DENYING PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO VACATE ARBITRATION AWARD AND GRANTING DEFENDANT'S MOTION TO CONFIRM ARBITRATION AWARD [Docket Nos. 1, 32, 35, 40]

The motions of plaintiff Theis Research, Inc. ("TRI" or "plaintiff1) for partial summary judgment and to vacate arbitration award and of defendant Brown & Bain ("Brown" or "defendant") to confirm arbitration award were heard on July 27,2001. The court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the court denies TRI's motions for partial summary judgment and vacation

of arbitration award and grants Brown's motion to confirm arbitration award.

I. BACKGROUND

TRI holds patents to numerous inventions made by Peter Theis in the fields of telecommunications and voice processing technologies. Mot. PSJ 6:11-14.[1] Octel, a supplier of equipment to various regional Bell operating companies, fearing infringement litigation, filed suit against TRI in this court on April 9, 1992, and sought a declaration of invalidity and non-infringement for certain of TRI's patents. Johnson Decl. Exh. 8.

About the same time as the Octel litigation was filed, PacTel Cellular Inc. of Arizona retained Brown to represent it in an action in Arizona state court. Theis Decl. Exh. 3 at 1. At that time, PacTel Cellular Inc. of Arizona was owned by PacTel Cellular Corporation, in turn a subsidiary of PacTel Corporation, which was wholly owned by Pacific Telesis Group. Id.

On April 15, 1992, PacTel in-house counsel advised Octel that PacTel Cellular "was subject to TRI claims for the use of Octel equipment." Johnson Decl. Exh. 10 at 2:14-19. PacTel demanded indemnification of PacTel Cellular by Octel, and promised that PacTel Cellular would assist Octel against TRI. Id. TRI filed a motion to dismiss or transfer this action on May 20,1992. Johnson Decl., Exh. 11 at 1. Both PacTel Cellular in-house and outside counsel filed

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[1] The abbreviations used are as follows: motion of plaintiff Theis Research, Inc. for partial summary judgment ("Mot. PSJ"); Brown & Bain's opposition to motion of Theis Research, Inc. for partial summary judgment ("Opp. PSJ"); reply brief in support of motion of plaintiff Theis Research, Inc. for partial summary judgment ("Reply PSJ").

declarations in opposition to this motion.[2] Johnson Decl. Exh. 9-10. TRI's motion was denied on July 31,1992, resulting in TRI, an Illinois company, needing California counsel. Johnson Decl. Exh. 11 at 2.

Brown "pitched itself" to represent TRI. Johnson Decl. Opp. Dismiss Exh. 1 at 4-5. TRI gave Brown a list of companies against which it contemplated litigation on August 17,1992. Theis Decl. Exh. 1 at 2-4. The names "PacTel Cellular," "Pacific Telesis," and "Pacific Bell" were included on the list, but "PacTel Cellular Inc. of Arizona" was not. Id. Although TRI told Brown that it hoped in the future to bring claims against some of the entities named on the list, particularly noting that Pacific Telesis and several others were "involved directly in matters under discussion," at the time of Brown's retention, TRI was engaged in litigation only with Octel Corporation. 14; Johnson Decl. Exh. 15 at 1. The manner in which TRI's list was organized appears to indicate that TRI intended to specifically include those companies subsidiary to an enumerated regional Bell operating company, such as Pacific Telesis. Theis Decl. Exh. 1 at 2-4.

Brown ran an internal conflicts check on August 17, 1992, and found that PacTel Cellular Inc. of Arizona, was already a client of the firm. Theis Decl. Exh. 2 at 1-2. Brown's contact for PacTel Cellular Inc. of Arizona was Paul White, who was not only General Counsel of PacTel Corporation, but was also PacTel Cellular's in-house counsel. Theis Decl. Exh. 3 at 1; Exh. 5 at 5. Brown included an addendum with the retainer agreement (attachment 2) listing corporations against which Brown

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[2] Plaintiffs request for judicial notice of the declarations of Robert Barr and Mary M. Hamaker in opposition to Theis Research's motion to dismiss or alternatively, to transfer, is granted.

could opt not to represent TRI. Johnson Decl. Exh. 15 at art. 2. Neither Pacific Telesis nor any of its subsidiaries were included in this list. Id. On October 30, 1992, TRI signed a retainer agreement with Brown for the Octel litigation. Johnson Decl. Exh. 15. This agreement contained a binding arbitration provision. Id.

Brown attorney Martin Lagod states in his declaration that in late 1992 he informed Peter Theis in a "conversation" that Brown would not represent TRI in any action against Pacific Telesis or PacTel Cellular Corporation. Lagod Decl. ¶¶ 3-4. Lagod states that Theis did not request that Brown withdraw from either its representation of TRI or PacTel Cellular Inc. of Arizona. Id. On June 16, 1993, a Brown internal memorandum analyzing this conflict situation was completed. Theis Decl. Exh. 5. The memorandum states that Brown contacted a legal ethicist at Boalt Hall School of Law on the matter, who advised Brown that its concurrent representation of TRI and PacTel Cellular Inc. of Arizona amounted to no more than "a very attenuated pure loyalty conflict" which should not disqualify Brown from representing either client. Id. at 8. Brown sought a signed waiver by PacTel on June 16, 1993 acknowledging the conflict, (subsequently signed by Paul White on June 21, 1993), but no such written waiver was ever presented to TRI. Theis Decl. Exh. 4; Theis Decl. ¶ 3. TRI asserts that Brown "never sought TRI's informed written consent, never provided TRI with written disclosure, and never even told TRI" of the conflict. Mot. PS J 9:1-4; Theis Decl. ¶¶ 3, 8.

On November 6, 1992, Brown filed a counterclaim on behalf of TRI in the Octel litigation, Alleging infringement of several of TRI's patents. Johnson Decl. Opp. Dismiss Exh. 1 at 11. Later, similar infringement claims were brought against other telecommunications companies,

including PacBell and certain of its suppliers and subsidiaries. Id at 11-12. A similar action against Bell Atlantic and many of its subsidiaries was brought by TRI in the Eastern District of Virginia in November 1992. Id. at 12. TRI stipulated in the Virginia proceeding that the findings in the California case would be binding on the parties to the Bell Atlantic litigation. Id. at 13. Many of the infringement and invalidity issues in the Octel suit were tried by jury in September 1994 with a result adverse to TRI. Other bifurcated issues were resolved by dispositive motions and judgment on those issues was entered on September 30,1998. The separate judgment on the jury verdict was affirmed on appeal (Octel Communications v. Theis Research Inc., 132 F.3d 51 (Fed. Cir. 1997)) as was the judgment on the issues resolved by summary judgment. Octel Communications v. Theis Research Inc., 217 F.3d 860 (Fed. Cir. 2000).

While the bifurcated issues were pending in this court and the appeal from the judgment on the jury verdict was pending before the Federal Circuit, this court in April 1995 granted Brown's motion to withdraw from its representation of TRI. In January 1996, TRI and Peter Theis served a demand for arbitration claiming legal malpractice, breach of fiduciary duty, fraud, and breach of contract against Brown, and the parties selected an arbitrator in November 1998. Upon completion of arbitration in April 1999 the arbitrator ruled against Theis and TRI on all of their claims. On July 12, 1999, TRI filed a complaint for legal malpractice and motion to vacate the arbitration award in this court. Brown moved to dismiss the complaint on August 16, 1999. Brown's motion to dismiss the complaint was granted, and TRI's motion to vacate the arbitration award was denied without prejudice on venue grounds. Judgment was entered on October 21, 1999; TRI moved to alter, amend, or vacate the judgment on November 2, 1999,

and the motion was denied on December 29, 1999. TRI appealed the grant of Brown's motion to dismiss and the dismissal without prejudice on venue grounds on January 19, 2000.

On February 18, 2000, Brown filed a petition for confirmation of the arbitration award in the U.S. District Court for the District of Columbia. On June 19, 2000, the District Court for the District of Columbia stayed the proceedings pending resolution of TRI's appeal by the Ninth Circuit.

On January 24, 2001, the Court of Appeals reversed this court's dismissal of TRI's motion to vacate based on the subsequently decided case of Cortez Byrd Chips. Inc. v. Bill Harbert Const. Co., 529 U.S. 193,195 (2000), which held that a motion to vacate or confirm an arbitration award could be brought in a district other than the one in which the arbitration was held. Theis Research Inc. v. Brown & Bain, 240 F.3d 795 (9th Cir. 2001). The Court of Appeals vacated as premature the dismissal of TRI's complaint and remanded the action to this court. It expressed no opinion as to the validity of TRI's complaint or its motion to vacate. Id. at 796.

On March 27, 2001, the District of Columbia district court transferred its case to this court. On April 26, 2001, Brown filed the present motion to confirm arbitration award. TRI filed the present motion for partial summary judgment and to vacate award on June 4, 2001.

II. ANALYSIS

A. TRI's Motion for Partial Summary Judgment

1. Illegality

TRI moves for partial summary judgment against Brown on the ground that the arbitration was void. TRI asserts that the retainer agreement containing the binding arbitration clause was unlawful due to an alleged conflict of interest on the part of Brown. Under both California and federal law, "arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Armendariz v. Foundation Health Psychcare Services. Inc., 24 Cal. 4th 83, 98 (2000); see also 9 U.S.C. § 2; Cal. Code Civ. Proc. § 1281. Under California Law, a contract is unlawful if it is "[c]ontrary to an express provision of law," "[c]ontrary to the policy of express law, though not expressly prohibited," or "otherwise contrary to good morals." Cal. Civ. Code § 1667. The California Supreme Court has held that if "grounds exist to revoke the entire contract" and the contract contains an arbitration clause, "such grounds would also vitiate the arbitration agreement." Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 29 (1992). Thus, "if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether." Id. at 29-30 (citing California State Council of Carpenters v. Superior Court, 11 Cal. App. 3d 144, 157 (1970).

Here, TRI contends that the retainer agreement is unlawful under California Civil Code section 1667 because Brown's failure to provide TRI with written disclosure of the alleged conflict of interest violated Rule 3-310 of the California State Bar Rules of Professional Conduct. Cal.

Civ. Code § 1667; Cal. R. Prof. Cond. Rule 3-310. TRI cites Loving & Evans v. Blick, 33 Cal. 2d 603 (1949), All Points Traders. Inc. v. Barrington Associates, 211 Cal. App. 3d 723 (1989), and Lindenstadt v. Staff Builders, Inc., 55 Cal. App. 4th 882 (1997), in support of its position that the illegality argument may be raised at any point during the proceedings. See Mot. PSJ 15:10-11, Reply PSJ 7:9-12.

However, the retainer agreement at issue here is distinguishable from the contracts at issue in the above-cited cases. Both All Points Traders and Lindenstadt involved contracts between an unlicensed real estate broker and another party, and Loving involved a contract between an unlicensed contractor and another party. California law specifically forbids unlicensed contractors and real estate brokers from bringing or maintaining any action in any court.[3] Thus, any contract made between an unlicensed real estate broker or contractor and another party cannot be enforceable, and is void. Cal. Bus. Prof. Code. §§ 703 l(a) and 10136(a); see Rest. 2d Contr. § 7, comment a. In contrast, the retainer agreement at issue here was not void. Brown may have had a duty to provide written disclosure to TRI of any conflict of interest. See Cal. R. Prof. Cond. Rule 3-310; Cal. Civ. Code § 1667. When TRI became aware that Brown had a conflict of interest that it feiled to disclose, TRI could have elected to seek release from the retainer agreement. TRI could also have waived the conflict. The contract was thus voidable, not void. See Rest. 2d Contr. § 7, comment b; Cal. R. Prof. Cond. Rule 3-310. Although TRI apparently claims that it was unaware of Brown's alleged conflict of interest until after the arbitration had ended, TRI clearly knew about it by

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[3] Under Loving, the phrase "action in any court of this State" also applies to proceedings to confirm arbitration awards. Loving, 33 Cal. 2d at 611-13.

November 20,1998, four months before the arbitration, when it named Pacific Telesis Group as one of Brown's conflicts in response to Brown's interrogatory. Schaible Decl. Mot. Dismiss Exh. C at 2. TRI also identified several of the documents on which it now relies to show a conflict as exhibits to its revised February 26,1999 arbitration exhibit list. See Schaible Decl. Exh. A at 1. These include Brown's initial conflicts check listing PacTel Cellular Inc. of Arizona as a Brown client (Exhibit 107) and the waiver sent by Brown to PacTel counsel Paul White detailing the conflict situation with TRI (Exhibit 125). Schaible Decl. ¶ 3, Exh. A at 4-5. TRI even stated in its initial written submission in the arbitration: "[i]n the course of these efforts, B&B pursued, on TRI's behalf, claims against a related party to one of B&B's own clients. B&B sought the advice of a law professor as to the ethical issues raised (Ex. 125; Brown, pp. 49-51), but B&B never disclosed the matter to TRI or sought TRI's consent." Johnson Decl. Opp. Dismiss Exh. 2 at 4. Thus, while TRI apparently did not actively pursue this claim during the arbitration, the quoted passage indicates that TRI was aware of the conflict situation with PacTel Cellular Inc. of Arizona prior to the arbitration proceedings.

TRI's arbitration exhibits 107 and 125 clearly serve as written disclosure by Brown of the alleged conflict of interest, and the record shows that TRI was aware of their import prior to the beginning of the arbitration. Thus, TRI had ample opportunity before arbitration to seek to withdraw its election to arbitrate or present the conflict issue to the arbitrator or the court. TRI, however, did not do so and instead proceeded with the arbitration. Therefore, TRI waived any claim that it was not contractually obligated to arbitrate any disputes with Brown or that the arbitration was a nullity.

2. Fraud

Even if TRI's claim is that the retainer agreement was obtained by fraud, the same result is feached. When a contract containing an arbitration clause is challenged as being fraudulent, the type of fraud determines whether the court may hear the claim. When the claim is that fraud "induced the entering into of the arbitration clause itself, the matter must be resolved by the court rather than the arbitrator." Johnson v. Siegel, 84 Cal. App. 4th 1087, 1095 (2000) (citing Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951,973 (1997Y): Three Valleys Municipal Water District v. E.F. Hutton & Co.. Inc., 925 F.2d 1136, 1139 (9th Cir. 1991) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967)). Any other claim must be heard by the arbitrator. Johnson, 84 Cal. App. 4th at 1095. Further, a distinction is made between fraud in the execution (where the signer did not know what the true nature of the document was) and fraud in the inducement (where the signer understood the document but would not have signed had he or she known all of the facts). See Southwest Administrators. Inc. v. Rozay's Transfer, 791 F.2d 769, 774 (9th Cir. 1986). In the former case, the contract is void because the fraud goes toward the making of the contract itself, "induc[ing] a party to believe the nature of his act is something entirely different than it actually is." Id. In the latter case, "[f]raud in the inducement of the underlying contract... is not sufficient to defeat an arbitration clause," because the clause was knowingly entered into. Johnson, 84 Cal. App. 4th at 1094. If the claim is fraud by inducement, the arbitrator "is competent and empowered to decide issues" relating to it, even if the claim includes allegations of a "grand scheme of fraud, or fraud permeating the transaction." Id.; Rosenthal v. Great Western Financial Securities Corp., 14 Cal. 4th 394, 398 (1996).

TRI's implied assertion is that it would not have signed the retainer agreement had it been aware of Brown's alleged conflict of interest. TRI thus could only claim fraud by inducement, not fraud in the execution. See Southwest Administrators, 791 F.2d at 774. As such, the retainer agreement was not void *ab initio*, and the matter was properly arbitrated pursuant to the arbitration clause. Further, TRI proceeded with arbitration after it had been provided with documents showing the alleged conflict. TRI cannot legitimately claim at the time it arbitrated that its agreement to arbitrate was unlawful.

3. Summary Judgment

Summary judgment is properly granted when there are no genuine disputed issues of material fact and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The burden of proof to show an absence of material factual dispute lies with the moving party. See Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000). Here, TRI has failed to meet its burden of showing that it had neither actual nor constructive knowledge of Brown's relationships prior to or during the arbitration proceedings, a necessary showing in order for TRI to prevail. In the absence of such a showing, TRI's claim of illegality is waived, and its motion for partial summary judgment fails.[4]

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[4] An arbitration award has the same preclusive effect as a judgment of court under the rules of res judicata. See this court's order granting defendant's motion to dismiss complaint and dismissing plaintiff's motion to vacate

B. TRI's Motion to Vacate Arbitration Award and Brown's Motion to Confirm Arbitration Award

TRI argues that the arbitration award should be vacated because (1) Brown allegedly made ex parte submissions to the arbitrator; (2) the arbitrator failed to disclose his involvement with Brown's insurer to TRI; and (3) the arbitrator failed to disclose that another arbitrator in his office had been chief counsel for Bell Atlantic, a corporation which had been adverse to TRI. The court's role in reviewing an arbitration award under the Federal Arbitration Act is "extremely narrow." Employers Ins. of Wausau v. National Union Fire Ins. Co. of Pittsburgh, 933 F.2d 1481, 1485 (9th Cir. 1991) (citations omitted). The court "may not predicate reversal on the arbitration panel's erroneous findings of fact or conclusions of law." Id. Under federal law, a court may vacate an arbitration award only (a) where the award was procured by corruption, fraud, or undue means; (b) where there was evident partiality or corruption of the arbitrators; (c) where the arbitrators were guilty of misbehavior by which the rights of any party have been prejudiced; or (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award was not made. See 9 U.S.C. § 10.[5]

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without prejudice, filed October 21, 1999, at 2:23-3:15, 4:7-13.

[5] Under California law, essentially the same standard applies. California Code of Civil Procedure section 1286.2 sets forth the six grounds available to the court for vacation of an arbitration award, including: (a) involvement of fraud or corruption in the arbitration award, (b) arbitrator corruption, (c) arbitrator misconduct leading to prejudice against any party, (d) the arbitrator exceeded his or her powers and the award cannot be corrected without affecting tile merits of the decision upon the controversy submitted, (e) failure to postpone the arbitration

"The burden of showing partiality" rests on the party challenging the arbitration decision. Woods v. Saturn Distribution Corp., 78 F.3d 424,427 (9th Cir. 1996) (citation omitted). Furthermore, claims of impropriety or bias are waived unless a timely objection is made. "A party may not sit idle through an arbitration proceeding and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse." Wellman v. Writers Guild of America. West. Inc., 146 F.3d 666, 673 (9th Cir. 1998) (citing Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1484 (9th Cir. 1993)).

1. Ex Parte Submissions

TRI argues that the award should be vacated based on Brown's alleged ex parte submission of three letters to the arbitrator. However, the arbitrator stated on the record on the first day of arbitration that he had received three letters from Brown, and offered them to TRI's counsel to read. See Schaible Decl. Mot. Conf. Exh. F at 23:7-22. TRI apparently did not object to these submissions (one of which TRJ had in fact already received) either at that time, or subsequently in fie proceedings. Id. Further, TRI has failed to show how it was prejudiced by these ex parte communications. Because a party to an arbitration cannot collaterally attack the arbitration on grounds that were evident during the proceedings, see Wellman, 146 F.3d at 673, TRI is estopped from bringing this claim after the conclusion of the arbitration proceedings.

2. Insurer's Involvement

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when. Circumstances so dictated, and (f) failure of an arbitrator to disqualify him or herself under section 1281.9. See Cal. Code Civ. Pro. § 1286.2.

TRI also contends that the award should be vacated because the arbitrator was allegedly given information regarding Brown's insurer, despite the fact that he was not allowed to consider insurance matters, and that because this insurer had previously been a party in matters before the arbitrator, there may have been some bias on the part of the arbitrator. Schaible Decl. Exh. F at 6:2-6. TRI asserts that the arbitrator failed to inform TRI of his ties to the insurer, and did not give a full accounting of his contacts with the insurer. In California, an arbitrator is obligated to disclose to the involved parties those business relationships that might create an impression of possible bias. Britz, Inc. v. Alfa-Laval Food & Dairy Co., 34 Cal. App. 4th 1085, 1103 (1995) (citations omitted). However, in order to disqualify an arbitrator, "parties must demonstrate more than a mere appearance of bias," because arbitrators are not required to be held to the same high standards of impartiality as used for judges. Employers Insurance, 933 F.2d at 1489; see also Toyota of Berkeley y. Automobile Salesmen's Union. Local 1095. United Food and Commercial Workers Union, 834 F.2d 751, 755-6 (9th Cir. 1987).

Here, the arbitrator fulfilled his obligation to disclose to the parties his connection to Brown's insurer. On the first day of the arbitration proceedings, the arbitrator stated on the record that he had previously mediated malpractice matters in which one or more of the parties had been insured by Brown's insurer and that a representative of the insurer had attended. Schaible Decl. Exh. F at 5:18-6:18. Although the arbitrator expressly asked the parties if they objected, TRI did not do so, either at that time or later in the proceedings. Id TRI cannot collaterally assert an objection which was not made during the actual proceedings. See Wellman, 146 F.3d at 673.

3. Conflict of Interest

Finally, TRI contends that one of the arbitrator's colleagues at JAMS/Endispute had been the head counsel for Bell Atlantic, a corporation previously adverse to TRI, and that the arbitrator failed to disclose that alleged conflict to the parties. See Theis Decl. Opp. Conf. Arb. Exh. 1 at 1.[6] In the Ninth Circuit, the arbitrator has a duty to investigate and disclose any conflicts of interest that he or she may have with the parties to the arbitration. See Schmitz v. Zilveti, III, 20 F.3d 1043, 1049 (9th Cir. 1994). If an arbitrator fails to disclose a conflict of interest, a "reasonable impression of bias" is treated, because the "integrity of the process by which arbitrators are chosen is at issue." Woods, 78 F.3d at 427. Discovery related to a conflict of interest is not permitted without presentation of clear evidence of impropriety. See Woods, 78 F.3d at 430 (citing Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691,702 (2nd Cir. 1978) (upholding a district court's refusal to allow discovery as "a classic example of a losing party seizing upon a pretext for invalidating the arbitration award")); Coast Plaza Doctors Hosp. v. Blue Cross of California, 83 Cal. App. 4th 677, 689 (2000) ("limited discovery rights are the hallmark of arbitration").

Here, there is no evidence of any conflict of interest. The colleague left the arbitrator's firm in November 1998, the same month that the arbitration hearings began, and no evidence has been presented to show that the arbitrator

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[6] Although there is no evidence that TRI objected to the arbitrator based on a conflict of interest, a conflict of interest claim is not waived by failure to object unless the party was apprised of the conflict before the end of the proceedings. See HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1131 (CD. Cal 1999). There is no evidence in the record of any such disclosure, though TRI does appear to indicate that it learned of Wright's employment prior to the end of the arbitration. See Opp. Theis Mot. Conf. 2:23-24.

otherwise had any connection to Bell Atlantic. Theis Decl. Opp. Conf. Arb. Exh. 3. The party challenging the arbitration decision on the basis of arbitrator bias or conflict bears the burden of proof. See Woods, 78 F.3d at 427. TRI had the burden to prove a conflict of interest, but has failed to provide sufficient evidence to meet this burden.

Since TRI has failed to carry its burden of establishing grounds to vacate the arbitration award, the award must be confirmed.

III. ORDER

For the reasons set forth above, the court denies plaintiffs motions for partial summary judgment and vacation of arbitration award and grants defendant's motion to confirm arbitration award.

DATED: 8/29/01

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge